LaGuardia Hospital—H.I.P. Hospital, Inc. *and* LaGuardia Association for Registered Nurses. Cases 29-CA-8024, 29-CA-8062, and 29-CA-8095

March 31, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 29, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the Respondent and the Charging Party filed exceptions, supporting briefs, and answering briefs to each other's exceptions.

Pursuant to the provisions of kSection 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

We agree with the Administrative Law Judge that, in the circumstances of this case, the Union's need for the relevant information in certain patients' charts outweighs the legitimate concern with an invasion, albeit a limited one, of the patients' privacy. But there is another factual consideration, the significance of which, from the tenor of the arguments before us, may have been lost on the parties. The Administrative Law Judge correctly followed the balancing of interests test set forth in *Johns-Manville Sales Corporation*, 252 NLRB 368 (1980). In *Johns-Manville*, however, the focus of the dispute was the providing of names of persons identified as suffering from certain medical disorders. Here, the relevant information sought is not the names of the patients but certain notations on their charts. The Administrative Law Judge's recommended Order does not, by its terms, compel the furnishing of the names of the patients whose charts are to be abstracted, and the names themselves are not apparently relevant to the Union's purposes. Thus, it is in the interest of all the parties to the instant dispute, and of the patients, that the parties act in good faith to insure the accuracy of the relevant materials so that the patients' identities need be revealed only to nurses who already were in a confidential relationship with such patients, and then only if a comparison of the abstracts with the original charts is necessary to verify their accuracy. In this way, the patients' privacy may be preserved without impairing the Union's right to the relevant portions of their charts.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, LaGuardia Hospital—H.I.P. Hospital, Inc., Forest Hills, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(c):

"(c) Post at its place of business in Forest Hills, New York, copies of the attached notice marked 'Appendix.'[19] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

2. Delete footnote 20.

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We shall delete fn. 20 as it is inapplicable.

[3] If the parties cannot accomplish these objectives, resolution can be had at the compliance stage of the proceeding. Cf. *Food Employers Council, Incorporated, et al.*, 197 NLRB 651 (1972).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse or fail to bargain in good faith with LaGuardia Association for Registered Nurses by refusing to furnish the Union information relevant to the processing of grievances or the administration of our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended, or in any like or related manner refuse to bargain with the Union as the exclusive bargaining representative in the following appropriate unit:

All full-time and regular part-time registered professional nurses and other persons lawfully authorized by permit to practice as registered nurses, including staff nurses, team leaders, assistant head nurses, head nurses, infection control nurses, utilization review nurses and nurse anaesthetists employed by LaGuardia Hospital—H.I.P. Hospital, Inc., at its Forest Hills location, exclusive of the directors of nurses, assistant directors of nurses, associate directors of nurses, nurse supervisors, clinical supervisors, nurse anaesthetist supervisors, emergency room supervisors, recovery room supervisors, inhalation therapist and all other employees, guards and supervisors as defined in the Act.

WE WILL, upon request, forthwith furnish to the Union the personnel files of Elizabeth Schuppel, Leslie Stables, and Joanne Rosenberg.

WE WILL, upon request, forthwith furnish to the Union the progress notes portion of the patients' charts which are relevant to the grievance of Elizabeth Schuppel and the emergency room and operating room sheets which are relevant to the grievances of Parkash Kahara and Linda Gabriel; provided, however, that upon receipt of such medical records the Union, its officers, agents, members, and attorneys shall not divulge such information to any other persons who are not involved in or necessary to the resolution of the grievances in question.

LAGUARDIA HOSPITAL—H.I.P. HOSPITAL, INC.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard by me on March 24, 25, and 26, 1981. The charge in Case 29-CA-8024 was filed on May 20, 1980, the charge in Case 29-CA-8062 was filed on June 6, and the charge in Case 29-CA-8095 was filed on June 18.[1] An order consolidating cases and complaint was thereafter issued by the Regional Director for Region 29 on July 31.

On March 25, 1981, after the hearing opened, the parties entered into a formai settlement stipulation as to certain allegations of the complaint which was approved by me. This stipulation provided, *inter alia*, for a Board order and the entry of a court decree enforcing the order. In view of the settlement stipulation, the issues for litigation were substantially narrowed and involved only the contention by the General Counsel that the Respondent refused to furnish certain information to the Union in relation to grievances filed by employees. In substance, the remaining issues for litigation, as set forth in paragraphs 16, 17, and 20 of the complaint were whether the Respondent failed and refused to furnish to the Union relevant data relating to grievances such as personnel files, patient charts, Respondent's operating room policy and procedures manual, and the New York State Health Code.

The Respondent's position on these matters is as follows:

(1) As to certain of the items, it contends that the information was never requested by the Union.

(2) With respect to the Health Code, the Respondent asserts that this is a public statute which, with attendant rules and regulations, is contained in a multivolume publication equally available to the Union as it is to the Respondent.

(3) With respect to personnel files, the Respondent claims that in one of the grievances in question, it did turn over the relevant portions of the file. The Respondent also contends that, pursuant to the most recent collective-bargaining agreement, the Union has waived its right to review personnel files except in limited situations not involved herein.

(4) As to the operating room policy and procedures manual, the Respondent contends that this book is kept in the nursing station of the operating room and in the nursing administrative office, that it is kept in a place where it is at all times accessible to the nurses for inspection and copying and, accordingly, that it never was withheld from the Union whose membership and officers are composed entirely of registered nurses employed by the Hospital.

(5) With respect to patient charts, the Respondent contends (a) that the requests allegedly made were ovely broad, (b) that significant portions of the patient charts would not be relevant to the grievances in any circumstances, (c) that the information contained in the patient charts allegedly requested were not relevant to the particular grievances involved, and (d) that the patient charts contain confidential information, the disclosure of which would invade the privacy of the patients.

Upon the entire record, including my observation of the demeanor of the witnesses and after reviewing the excellent briefs filed by the parties, I make the following:

[1] Unless otherwise indicated all dates are in 1980.

FINDINGS OF FACT

I. JURISDICTION

It is conceded that the Respondent is a hospital incorporated pursuant to the laws of the State of New York and is located at 102-01 66th Road, Forest Hills, New York. It also is admitted that the Respondent derives gross annual revenues in excess of $250,000 and that it purchases hospital supplies, drugs, and other goods valued in excess of $50,000 which are delivered to it, in interstate commerce, directly from States other than the State of New York. Based on the above, I find that the Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE COLLECTIVE-BARGAINING HISTORY

It appears that the Union has been the recognized collective-bargaining representative of the registered nurses of the Respondent for a number of years. It also appears that in March 1980, the Union withstood an attempt by another labor organization, District 1199, League of Registered Nurses, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, to represent the nurses. That is, on March 6, a secret-ballot election was conducted by the Board's Regional Office in which a majority of the bargaining unit employees voted for the Charging Party which was then certified as the exclusive collective-bargaining representative for these employees.

The Union, itself, is an unaffiliated labor organization which consists solely and exclusively of the registered nurses employed by the Respondent and its officers are drawn from these people. The grievance committee of the Union is open to any nurse who volunteers to serve and, except for the Union's counsel, Marinelli, the grievance committee consists of employees of the Respondent. Marinelli is designated as the grievance co-chairman and has attended, from time to time, grievance meetings in addition to representing the Union, as an attorney, at arbitration hearings.[2]

Introduced into evidence were two collective-bargaining agreements between the Respondent and the Union. The first was executed in 1977 with a term to expire on April 24, 1980. The second contract runs for a term from April 24, 1980, to April 24, 1982. Both contracts contain provisions relevant to this proceeding as folows:

(a) The agreement expiring in 1980, at section 4.11 provides, *inter alia*:

> In promotion, Employer will be guided by seniority only if the involved employees' abilities, qualifications and potential (including, without limitation, preparation, ability, dependability, skill, efficiency and physical fitness) are approximately equal in the reasonable judgment of the Vice President for Nursing. Employer's decisions under the preceding sentence will be subject to the grievance procedure contained in Section 14.[3]

(b) At section 10.03 of the first contract, it provides:

> *Discharge and Penalties.* The Employer shall have the right to discharge, suspend, or discipline any employee for cause. The Employer will notify the Association at its office and the Chairman for the constituent Council in writing of any discharge or suspension within twenty-four (24) hours from the time of discharge or suspension. If the Association desires to contest the discharge or suspension, it shall give written notice thereof to the Employer not later than ten (10) working days from the date of receipt of notice of discharge or suspension. In such event, the dispute shall be submitted and determined under the grievance and arbitration procedure set forth, however, commencing at Step Two of the grievance procedure.[4]

(c) Both contracts provide for a grievance procedure culminating in final and binding arbitration. It is agreed that in cases involving employee suspensions or discharges, a grievance under the 1977-80 contract, commenced at the third step.

(d) The 1980-82 contract has a provision at section 14.07 which states:

> An employee who is suspended or discharged shall be allowed to review and copy at the Personnel Office his/her personnel file upon request, except for references received from prior employers.

There was no similar provision in the 1977-80 contract.

(e) Both agreements have a provision entitled "Withdrawal of Demands," which, in both documents, reads as follows:

> Prior to and during the negotiation of this Agreement, each party made certain proposals to the other. Each party hereto agrees that it has withdrawn all proposals made to the other that are not incorporated in or covered by this Agreement, in whole or in part. The withdrawal of those proposals, in whole or in part, is as much a consideration for this Agreement as is the incorporation therein of matters agreed on. Each party hereto hereby waives any right to require the other to bargain on the subject matter of those proposals, or on any similar

[2] On a few occasions in the past, a non-attorney in Marinelli's office has attended grievance meetings to take notes.

[3] The 1980-82 contract was a similar provision at sec. 4.11 relating to promotions and transfers.

[4] The 1980-82 contract states:

10.03 *Discharge and Discipline*:

The Employer shall have the right to discharge, suspend or discipline any employee for just cause. The Employer will notify the Association at its offices in writing of any discharge or suspension within twenty-four (24) hours of the time of the discharge or suspension. However, copies of written warnings, not affecting time or money, shall be sent to the Association on a monthy basis.

> proposals or on any other matter that might have been included in or covered by this Agreement but was not. It is the intention of the parties that this Agreement during its term shall cover all arrangements between the parties concerning wages, hours and conditions of employment that are to be in effect during the terms and that nothing shall be added to the Agreement or subtracted from it by amendment, supplemental agreement or otherwise.

With respect to the issue of personnel files, there was no evidence presented to show that during the negotiations for the 1977–80 contract, the issue of whether or under what circumstances such files would be made available to employees or the Union was raised, discussed, or explored by the parties. Obviously, this subject matter was discussed and negotiated in the 1980 contract as it sets forth a provision relating to the matter. Although I heard no evidence regarding the nature of the negotiations leading up to this latter contract, the Respondent contends that the parties clearly intended that the only occasions where personnel files would be made available are those involving cases where employees are suspended or discharged.

IV. THE OPERATIVE FACTS

A. *The Grievance of Elizabeth Schuppel*

In November 1979, nurse Elizabeth Schuppel filed a grievance regarding the rejection of her request for a promotion to head nurse in the delivery room. A step one meeting was then held on November 12, but nothing could be resolved because Miss Roner, the person who made the decision, was unavailable due to illness. Thereafter when Roner returned, the Union filed a step two grievance. However, when the hospital announced that another nurse, Leslie Stables, was given the promotion, the grievance was moved to step three and a meeting was held at that level.

According to Linda Soderberg, the Union's president, she asked Lou Smith, the Respondent's assistant director, at the step three meeting for the personnel files of Schuppel and Stables so as to be able to compare their respective seniority dates along with their educational backgrounds and qualifications for the position of head nurse. She states that this request was denied without explanation. She also states that she did have available Schuppel's prior evaluations which were brought in by that employee.

A few days after the step three meeting, Soderberg was notified by Smith that the decision had been reversed and that Schuppel would receive the promotion. Thereafter, Stables filed a grievance which also was processed by the Union.[5]

In relation to the Schuppel grievance, Smith acknowledges that Soderberg made a request for Schuppel's personnel file but asserts that he gave to her the pertinent portions of the file such as evaluations, the employment application, and Schuppel's educational history. He also states that when he gave this information to Soderberg, she expressed no objection to the nature or extent of the information supplied.

B. *The Grievance of Joanne Rosenberg*

In February 1980, nurse Rosenberg received a verbal warning regarding her alleged mismedication of a patient. According to Soderberg, the warning also indicated that such errors had been made in the past, an assertion that Rosenberg contested. Rosenberg thereupon filed a grievance and a step one meeting was held. Soderberg states that, at the meeting, Supervisor Crocker explained the reason for the warning and voluntarily produced, without request, the doctor's order sheet along with the medication sheet (both of which are part of the patient's chart),[6] to verify the hospital's position on the discipline. Thus, by comparing the doctor's order sheet showing the medication ordered and the medication sheet where the nurse indicated the medicine given, a comparison of these two documents would prove or disprove the mismedication contention.

Soderberg testified that, during the step one meeting, she requested Rosenberg's personnel file because the latter denied that she had past medication errors. According to Soderberg, in late February a step three meeting was held at which she again requested Rosenberg's personnel file. She asserts that this request was denied but that once again the hospital produced, without request, the doctor's order sheet and the medication sheet to support its position on the discipline. Subsequent to this meeting, the Respondent notified Soderberg that it was not withdrawing the warning. It does not appear from this record that the grievance was processed further by the Union. Smith, on behalf of the Respondent, denied that Soderberg asked for Rosenberg's personnel file.

With respect to the request for this personnel file, Soderberg testified that the hospital maintains a progressive disciplinary procedure which commences with counseling and progresses to verbal warnings, written warnings, suspensions, and leads ultimately to termination. Thus, the Union asserts that Rosenberg's file was needed during the handling of her grievance to either verify or rebut the claim that she had other medication errors. Accordingly, if the Union had such information, it could either argue that the warning was too severe a punishment or, alternatively, discourage the grievant from pursuing the matter further.[7]

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[5] Inasmuch as Soderberg handled the grievance on behalf of Schuppel, another member of the Union's grievance committee handled Stable's grievance.

[6] The patient charts consist of a number of documents which, during the patient's stay at the hospital, are open to hospital employees. Indeed, nurses are required to review and make entries in the patient's chart during the patient's hospital stay. Among the documents comprising a patient's chart are the fact sheet containing information about the patient, consent forms for procedures and operations, physical examination reports, progress notes, doctor's order sheets, medication sheets, a medical history form, laboratory reports, post-operative reports, anesthesia records, pathology request forms, pathology reports, a vital sign sheet, and a discharge form. This list of papers is by no means all inclusive and is merely illustrative of the numerous types of documents that were a part of a patient's chart.

[7] Although Soderberg testified that the Union has discouraged employees from taking their grievances to arbitration when it appears that such

Continued

C. *The Grievance of Hya Sender*

The facts as presented by Soderberg regarding Sender essentially parallel the situation with Miss Rosenberg. She states that Sender received a written warning (as opposed to a verbal warning), regarding mismedication. She also states that at the step one meeting she asked for Sender's personnel file because Sender denied the hospital's assertion that she had made similar errors in the past. Soderberg further testified that at this meeting the hospital voluntarily, and without request, proffered the doctor's order sheet and the medication sheet to verify its claim.

Subsequent to the step three meeting, the hospital notified Soderberg that it was not retracting the warning and it does not appear from this record that the grievance was pursued further by the Union. In connection with this grievance, Smith denied that Sender's personnel file was requested.

D. *The Grievance of Jacqueline Michel*

Michel is an operating room nurse who was suspended for 2 days because she allegedly refused to carry out an order that she transport a patient from the operating room to a patient floor. Since the discipline involved a suspension, the grievance was initiated at the third step. According to Soderberg, Michel told her that it was her understanding that the normal procedure for transporting patients out of the operating room was for the nurse from the patient floor to do this.

A few days before the third step meeting was held in March 1980, Soderberg asked Smith to bring to the meeting the operation room policy and procedures manual because that would set forth the duties and functions of the operating room nurses and the past practice concerning the transportation of patients out of the operating room. Soderberg states that at the third step meeting she reiterated her request for the manual which was denied as being irrelevant to the grievance. Following the meeting, the Respondent denied the grievance and the Union filed for arbitration on Michel's behalf. Smith denied that a request was made for the manual.

It is noted that the manual in question is a single volume book which is kept in the nursing station of the operating room and is available for inspection by any nurse.[8] Although it appears that it may not be physically removed, nothing prevents a nurse from looking at the manual or making a copy of any of its provisions. There is no evidence herein that the Respondent refused to permit anyone from inspecting this manual prior to the grievance or that it was asked for and denied permission to make a photocopy of any relevant portion of the manual.

E. *The Grievances of Parkash Kahara and Linda Gabriel*

On May 15, 1980, these two nurses were assigned to the 3 p.m. to 11 p.m. shift. On that day, two situations arose which the Respondent described as emergencies, one involving a scheduled cesarean section and the other involving a gunshot wound. Both nurses left the hospital at the conclusion of their shift, which resulted in their suspensions because the hospital asserted that, by leaving, when they were aware that only one operating room team was coming on duty to relieve them, they abandoned their job and professional responsibilities and acted in a manner which could have had a serious impact on patient care. Thus, the Respondent took the position that these nurses, seeing that two patients were being booked for operations, should have set up the operating room and assisted with the cases even if that meant staying beyond their scheduled shift.

In relation to these grievances, Soderberg testified that the nurses claimed that, since the doctor for the expectant mother had not yet arrived, since the gunshot patient was not yet scheduled for an operation, and since the on-call nurses had arrived at 10:30 p.m., they were not needed beyond their normal shift. Soderberg also states that she was told by Gabriel that, although she was asked to stay, she left because she did not feel well and that Kahara asserted that she was not asked to stay.

In May, a grievance was filed at step three concerning the two suspensions. According to Soderberg, in a telephone conversation with Smith before the meeting, she asked for, among other things, the production of the patient's charts and the operating room policy and procedures manual concerning on-call nurses. She states that she asked for the manual because it would set forth the functions of the on-call nurses when the evening shift is about to end and what the procedures would be for the operating room nurses when there is an emergency case. As to the patient's charts, Soderberg states that she asked for these documents, explaining that they *would show* when the patients came into the operating rooms, whether there were nurses present to take over for the suspended nurses, who the doctors were, and if there was a lack of care for the patients. She therefore asserts that if the charts for the two patients had shown that the patients had gone into the operating rooms substantially later than 11 p.m., then it could be argued that the emergencies were less critical than asserted by the hospital and that the concomitant need for the two nurses was less than claimed.[9]

With respect to these grievances a step three meeting was held where Soderberg asserts that she again asked Smith to produce the information described above. Thereafter, when the hospital did not retract the suspensions, the Union took the grievances to arbitration. At the arbitration hearing, the Union subpenaed the manual and the patient charts. In response to the subpena, the Respondent produced the manual and turned over the

grievances were without merit, she also testified that the Union's current policy is to take any grievance to arbitration if so desired by the employee in question.

[8] Another copy of the manual is kept in the nursing administrative office.

[9] Although it is clear that Soderberg asked for the charts of the two patients in question, her testimony reveals that the only portion of the charts that would have been relevant for her purpose would have been the emergency room sheets and the operating room sheets.

patient charts to the arbitrator for an in-camera inspection, while asserting that the patient charts should not be turned over to the Union.[10]

Smith does acknowledge that Soderberg requested production of the patient charts in connection with these two grievances and that he refused to produce them. As to the operating room policy and procedures manual, he testified that this was not requested until after the third step meeting and until the Union subpenaed it for the arbitration hearing. With respect to the patient charts, he testified that he refused to produce them stating that they were not relevant to the grievances. As to the issue of relevancy, Smith asserts that since the two medical cases were designated as emergency cases, the only purpose the patient charts would serve would be to determine if the cases were truly emergency situations which is not a matter within the purview of nurses to decide. The issue of confidentiality will be discussed below.

F. *The Grievance of Joann Duffy*

Joann Duffy received a 2-day suspension for alleged insubordination in that she refused to take a "floating" assignment. That is, Duffy, who is regularly assigned to the delivery room, was asked to take a floating assignment in another part of the hospital and refused to do so.

On May 19, the Union filed a grievance on Duffy's behalf and in a phone conversation with Smith to set up a step three meeting, Soderberg asked him to bring that portion of the health code covering delivery room areas. She states that when he asked why, she told him that the code would show that nurses assigned to work in areas occupied by mothers and newborn infants need to be cultured[11] before going to work in these areas if they have immediately worked in other parts of the hospital. Thus, according to Soderberg, since Duffy was scheduled to work in the delivery room the day after she was asked to take the floating assignment, her refusal to take that assignment was explained and excused by reason of the health code provisions, presumably because an analysis of the culture would not have been completed before she went back to work in the delivery room area.

Thereafter, the step three meeting was held where Soderberg reiterated her request for the health code provisions. She states that Smith's response to this request was, "go get your own health code," an assertion which is basically admitted by Smith.

G. *The Second Grievance of Elizabeth Schuppel*

Schuppel received a written warning which was grieved in April 1980. The warning was in relation to the hospital's contention that she did not check the identification bands of a mother and baby with a result which most parents hope will never occur at a hospital. In connection with this grievance, Soderberg states that at the step one meeting she asked for the production of the patient charts because Schuppel had denied the mistake. In this regard, Soderberg testified that the progress note in the patient charts of the mother and baby would have a place where the nurse would have to enter the band numbers and therefore an examination of the charts would show if, in fact, the mistake were made. To this request, she states that the hospital replied that when the supervisory nurse discovered the mistake by looking at the baby's chart, she corrected the entry and the identification bands.[12]

At the third step meeting on this grievance, Soderberg states that she again asked for the charts of the baby and mother but that Smith refused to produce them. In this respect, Smith states that Soderberg did ask to see the patient charts to ascertain if the supervisor had corrected the numbers.

H. *The Confidentiality Defense*

As noted above, the Respondent takes the position that it is justified in refusing to turn over patient charts because the information contained therein is confidential and the production of such records would be a breach of the patients' right of privacy. In this respect, section 405.25 of the New York State Health Code states, in pertinent part:

> Patients' rights. (a) The hospital shall establish written policies regarding the rights of patients and shall develop procedures implementing such policies. These rights, policies and procedures shall afford patients the right to;
>
> (7) privacy to the extent consistent with providing adequate medical care to the patient. This shall not preclude discreet discussion of a patient's case or examination of a patient by appropriate health care personnel . . .
>
> (8) privacy and confidentiality of all records pertaining to the patient's treatment, except as otherwise provided by law or third-party payment contract . . .[13]

Apparently in furtherance of the above-quoted statute, the hospital has promulgated rules regarding the confidentiality of medical records as follows:

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[10] At the time of the hearing in this case, the arbitration of the Kahara and Gabriel grievances had not been concluded. It appears that the arbitrator reserved decision on the hospital's assertion that the patient charts should not be turned over to the Union.

[11] A culture is a process by which it is possible to determine what germs a person is carrying.

[12] It appears that in this case one baby was white and the other black. Therefore there was no real danger that the babies would have gone to the wrong parents.

[13] Also sec. 4504(a) of New York's Civil Practice Law and Rules, which regulates the procedures for trials in the New York courts, states in pertinent part:

> Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, and the patients to whom they respectively render professional medical services.

LA GUARDIA HOSPITAL

Department of Nursing

CONFIDENTIALITY OF INFORMATION

The Medical Record and its information is to be safeguarded at all times. Nursing personnel should exercise care and discretion in the verbal exchange of information regarding patients' conditions.

Medical records may not be released from the hospital's jurisdiction except by court order, subpoena or statute. Medical information will not be released without the patient's or next of kin's written consent.

Medical Records shall be kept within the nursing station unless they are taken by a member of the health team to the patient's bedside to a clinical conference or accompanying the patient for diagnostic or consultative services. If the chart is removed for conference purposes, the Head Nurse or Charge Nurse should be notified.

Records of previous admissions are kept within the nurses' station in a special folder. They should be returned to Medical Records within twenty-four hours.

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LA GUARDIA HOSPITAL POLICY MANUAL

MEDICAL RECORDS-2

TITLE: RELEASE OF MEDICAL RECORDS-A DECEASED PATIENT

The medical records of a deceased patient are to be kept confidential in the same manner as those of any other patient. Such records shall be released only in accordance with the process of law or the following procedure:

1. Where an estate is being probated, a copy of the letters of administration or letters testamentary should be requested by the Medical Records Department. Authorization for release of the records will be honored only when it comes from the administrator or executor of the estate.

2. Where there is to be no probate of estate, the Medical Records Department shall request affidavits from the next of kin and, where applicable, an attorney. The attorney's afffidavit should indicate that to the best of his/her knowledge, no estate is going to be probated. The affidavit of the next of kin should identify the affiant, should set forth his/her realationship to the deceased, should state that to the best of his/her knowledge he/she is the next of kin that and acting as such he/she authorizes the release of the records.

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MEDICAL RECORDS-1

TITLE: CONFIDENTIALITY OF PATIENT RECORDS

Records concerning patients are considered to be confidential. It is the obligation of all Hospital employees to protect the privacy of Hospital patients including out-patients as well as in-patients.

Employees may not discuss or divulge information contained in Hospital records with any unauthorized person. The privilege of authorizing release of Hospital records or information contained therein belongs to the patient. No one except authorized Hospital personnel is to be permitted to examine patient's records in the absence of written authorization of the patient.

Records are not to be removed from the Hospital without the express approval of the Hospital Medical Records Librarian.

In opposition to the claimed confidentiality of medical records (namely, patient charts), the General Counsel and the Charging Party offered evidence showing that, in the past, the hospital has proffered parts of a patient's chart in those situations where it desired to prove the validity of discipline imposed, for example in mismedication situations. They also point out that patient charts are by their nature not confidential *vis-a-vis* the nurses who are required to look at and make entries in them. Finally, they argue that even under New York law such medical records are not absolutely confidential, and that the patient's right of privacy will not prevail where such records are otherwise producible by law. They therefore argue that the obligation to furnish relevant medical records under the National Labor Relations Act must override the interest of confidentiality as expressed in New York's statutes.

V. ANALYSIS

It is well settled that an employer has an obligation, under Section 8(a)(5) of the Act, to comply with a union's request for information which is relevant to the processing of grievances or the administration of a collective-bargaining agreement unless there is a showing that the information requested is unduly burdensome, legitimately confidential, privileged in nature, or has been waived. *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *Detroit Edison Co.* v. *N.L.R.B.*, 440 U.S. 301 (1979); *Tom's Ford, Inc.*, 253 NLRB 888 (1980). Further, as to the question of relevancy, the criteria used is whether the information requested is probably or potentially relevant. Therefore, it need not be shown that the information will aid the union in winning the grievance so long as it is relevant to the subject matter in dispute. Indeed, the fact that the information, if produced at the early stages of grievance discussions would tend to establish that a grievance is without merit, equally serves a legitimate function of collective bargaining as such disclosure would thereby enable a union to determine which grievances should be pursued to arbitration and which should be dropped. In this respect the Supreme Court in *N.L.R.B.* v. *Acme Industrial Co.* stated:

> Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originated as griev-

ances had to be processed through to arbitration, the system would be woefully overburdened.

In relation to the case at hand, it is also noted that, although I must evaluate the nature of the grievances so as to be able to ascertain the relevancy of the information requested, it is not my purpose or function to evaluate the merits of any particular grievance or what ultimate impact the information requested would have had if the grievance had been presented to an arbitrator.

Before applying the legal principles to the facts of this case, it is concluded that Soderberg's version of the facts will be credited. In this respect, Soderberg impressed me with her candor and her testimony was marked by a high degree of detail and particularity. Accordingly, I shall credit her testimony regarding the various meetings and conversations she had with the Employer's agents when grievances were discussed, where information was requested, and where such requests were denied.

With respect to the request for the personnel files of Schuppel and Stables, in relation to the former's grievance over a promotion, it is noted that pursuant to section 4.11 of the collective-bargaining agreement then in effect (the 1977–80 contract), promotions were to be guided by seniority if other factors such as abilities, qualifications, and potential were approximately equal. Therefore, it is my opinion that the personnel files of the two competing nurses would have been relevant to the grievance. The fact that the Respondent, after the step three meeting, reversed its decision and granted the promotion to nurse Schuppel does not, in my opinion, make its refusal to furnish the personnel files moot, if for no other reason than an examination of those files might have led the Union to forego its pursuit of Schuppel's grievance which by its nature was to the detriment of nurse Stables who is also a member of the bargaining unit to whom the Union owed a duty of fair representation.

The relevancy of the personnel files of Joanne Rosenberg and Hya Sender is somewhat more problematical. In those two grievances there did not appear to be any dispute as to the facts giving rise to the disciplinary actions taken by the Respondent. Yet here too, I can see the relevancy of this information which was not sought to prove or disprove the hospital's contention that these nurses had made medication errors, but to rebut or confirm contentions that the nurses had made similar mistakes in the past. Therefore, given the fact that the Respondent maintains a progressive disciplinary system, information in the personnel files such as past counselings or warnings would have been relevant to the question of the severity of the discipline imposed. For if the files of the nurse had shown no prior errors or disciplinary actions, the Union might have been in a position to plausibly argue that the punishments were too severe. On the other hand, if the files did show past disciplinary actions or past errors, the Union would have been in a position to discourage the grievants and to inform them that further processing of their grievances would have been futile.

It is noted that all three grievances wherein personnel files were requested arose and were processed prior to the execution of the 1980–82 contract. Therefore, section 14.07 of the most recent contract, which provides that an employee may review and copy his or her personnel file in cases of suspensions or discharges, was not applicable. Accordingly, at the time these grievances arose and when the request for the personnel files were made, there was not, in effect, any provision of a collective-bargaining agreement which could have arguably been construed as a waiver. I therefore conclude that, at the time the Respondent refused to furnish the personnel files requested by the Union, it violated Section 8(a)(5) of the Act. However, inasmuch as there is no evidence to establish that since the execution of the 1980–82 contract the Union has sought personnel files in relation to grievances, it is not necessary for me to decide whether section 14.07 of the current contract should be construed as a waiver of the Union's right to obtain such personnel files in cases other than suspensions and discharges.

I shall next turn to the refusal by the Respondent to bring to a grievance meeting certain sections of the health code as requested by Soderberg in relation to the grievance of Joann Duffy. As noted above, the health code is a public statute which is published and therefore available to all persons. As such, it is not information which is generated by the hospital and does not appear to me to be the type of factual information which the Board has required companies to furnish to Unions. Indeed, the request here was for the Respondent to provide a copy of those sections of the health code relating to the delivery rooms, a request which was tantamount to a demand that one side do legal research for the other. In these circumstances, I do not conclude that the Respondent violated the Act by denying this request.

As to the request that the Respondent bring to certain grievance meetings a copy of the operating room policy and procedures manual, I do not believe that the hospital has violated the Act. It is clear that copies of this manual are kept in two places, one of which is, at all times, accessible to the nurses and therefore to the members and officers of the Union. Moreover, there is no rule or prohibition preventing any nurse from inspecting the manual or making copies of its relevant portions. As the information contained in this manual was always accessible to the Union, and as there is no evidence to suggest that the Respondent refused permission to inspect or copy relevant portions of the manual, I do not believe that the information contained therein was withheld. I therefore conclude that the Respondent, in this respect, did not violate the Act.

Finally, we must deal with the requests for patient charts which were made in connection with the grievance of Parkash Kahara, Linda Gabriel, and Elizabeth Schuppel.

The second grievance of Schuppel involved a situation where she allegedly gave the wrong identification bands to a mother and a baby, a contention which she denied. The progress notes, which are part of the patient charts, would show what numbers she entered thereon at the time, and the hospital's assertion that the supervisory nurse changed the numbers in the progress notes would therefore tend to confirm or rebut the contention that

Schuppel made the mistake. Accordingly, it is my opinion that only the progress notes portion of the patient charts would have been relevant to this particular grievance and that the remaining portions would have had no bearing on the matter in dispute. In this regard, it is conceded by Soderberg that she asked for the patient charts and did not limit her request to the relevant portion of the charts.

In the cases of Kahara and Gabriel, it appears that the main contention of the Union regarding their suspensions was that the "emergencies" were not so severe as to warrant the discipline imposed when these two nurses left their positions at the end of their shifts. Without purporting to determine the merits of the discipline imposed, it seems to me that the emergency room sheets and the operating room sheets that would indicate the time at which the two patients were brought in for operations would have been relevant to the grievances, at least insofar as the extent to which punishment was appropriate in the circumstances. Here too, Soderberg's request was for the patient charts and she did not limit her request to those portions of the charts which would have been relevant to the grievances.

While it has been noted above that Soderberg asked for the patient charts and did not specify what portions of these charts she sought as being relevant to the grievances, it nevertheless seems to me that the Respondent cannot contend, in the circumstances herein, that her requests were overly broad or were insufficiently specific. In both instances, Soderberg, during discussions of the problems giving rise to the discipline imposed, explained the purpose of the information sought and thereby indicated the type of information desired. Moreover, it is abundantly clear that the participants in the grievance meetings were knowledgeable as to the contents of patient charts and fully understood the types of information contained in the various documents comprising such charts. Therefore, when Soderberg asked for disclosure of the mother's and baby's charts to verify or rebut the hospital's contention regarding Schuppel, the people present at the meeting would have understood that the relevant documents would be the progress notes where the nurse's entry would have been written. Similarly, in relation to the cases of Kahara and Gabriel, since the discussion at the grievance meeting centered on when the patients went into the operating rooms, the people present would have understood that the emergency room sheets and operating room sheets were the documents containing this information and therefore constituted the relevant part of the patient's charts. Further, in all of these grievances, the Respondent did not ask Soderberg to specify or identify which portions of the patient's charts she desired, but rather refused her request on the grounds of relevancy.

The Respondent argues that even if certain parts of the patient charts were relevant to the grievances, its refusal to furnish such information was justified because they are medical records which are confidential. In this regard, the Board has recognized that documents containing medical information and which set forth the identity of persons having certain medical disorders have a "legitimate aura of confidentiality." *Johns-Manville Sales Corporation*, 252 NLRB 368 (1980); *United Aircraft Corporation*, 192 NLRB 382, 390 (1971). Thus, in situations where medical records are sought, it becomes necessary to balance "the Union's need for the information against any legitimate assertion of confidentiality by the employer." *Johns-Manville Sales Corporation, supra.*

Nevertheless, although it is recognized that the documents comprising a patient's chart have a degree of confidentiality which is also provided for by the laws of the State of New York, it also must be said that this confidentiality is not construed as being absolute. Thus, pursuant to the health code, the patient's right of privacy is counterbalanced when production of such records are "otherwise provided by law or third party contract." Moreover, while such records may be confidential *vis-a-vis* the general public, it is clear that these records are not intended to be confidential *vis-a-vis* the appropriate health care personnel, including registered nurses, who take care of patients during their stay at a hospital and whose observation, analysis, review, and entries on the patients' charts are a necessary part of the treatment. As such, it may be said that a patient entering a hospital gives his implied consent to appropriate medical personnel to make and look at records which are necessary for his care.[14]

Given the less than absolute nature of the patient's right to privacy, it seems to me that when a dispute arises concerning the discipline of nurses for errors in patient care, and where a particular portion of a patient's chart would be relevant to a grievance concerning such discipline, either to win the grievance or to dissuade the employee from taking her case to arbitration, that the Union's right to such information must outweigh the patient's right of privacy. This is especially true in case where the document requested is one which contains an entry made by the nurse who has been disciplined and where the entry, as in the case of Schuppel, would tend to either confirm or rebut the error alleged. Indeed, this principle is one which has been recognized by the Respondent in the past because at other grievance meetings it has not been shy about breaching the confidentiality of patient records when it voluntarily tenders to the Union doctor's order sheets and medication sheets to prove alleged medication errors made by nurses.

In light of the above, it is concluded that the Respondent by refusing to furnish to the Union, at the grievance meetings, relevant portions of patient charts, has violated Section 8(a)(1) and (5) of the Act.[15] However, in reach-

[14] Thus, even under the New York health code, a patient's right of privacy exists only to "the extent consistent with providing adequate medical care to the patient," and is not intended to "preclude a discreet discussion of a patient's case . . . by appropriate health care personnel." Sec. 405.25 (7) of the health code.

[15] The Respondent's contention that I should defer this matter to the pending arbitration proceedings is rejected. While it is true that the arbitrator in the cases of Kahara and Gabriel is being asked to rule on whether the Respondent is obligated to turn over the patient charts pursuant to a subpena, the issue in that case is not whether the Union has a right to relevant portions of the patient charts prior to arbitration at the preliminary steps of the grievance procedure. As such, the issue before the arbitrator does not encompass the issues in this case and his decision on the subpena question would not resolve whether the Union has a statutory right to such information pursuant to the National Labor Relations Act. Cf. *International Harvester Company*, 241 NLRB 600 (1979).

ing this conclusion, it is not my intention to require the Respondent to turn over to the Union the entire patient chart when this is requested, but only those limited documents which are necessary and relevant to the grievance under discussion. Further, in order to insure the general confidentiality of such medical records *vis-a-vis* persons who have no legitimate interest in these records, it should be understood that the Union's agents, officers, members, and attorneys are not to divulge this information to any other persons who are not involved in or necessary to the resolution of the grievance in question.[16]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization withing the meaning of Section 2(5) of the Act.

3. The Union is and has been at all times material herein the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act, of certain employees in an appropriate unit set forth below:

> All full-time and regular part-time registered professional nurses and other persons lawfully authorized by permit to practice as registered nurses including staff nurses, team leaders, assistant head nurses, head nurses, infection control nurses, utilization review nurses, and nurse anaesthetists employed by Respondent at its Forest Hills location, exclusive of the directors of nurses, assistant directors of nurses, associate directors of nurses, nurse supervisors, clinical supervisors, nurse anaesthetist supervisors, emergency room supervisors, recovery room supervisors, inhalation therapists, and all other employees, guards and supervisors as defined in the Act.

4. By failing and refusing to furnish to the Union personnel files as requested in relation to the grievances of Elizabeth Schuppel and Joanne Rosenberg, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By failing and refusing to furnish to the Union certain relevant portions of patient charts in relation to the grievances of Parkash Kahara, Linda Gabriel, and Elizabeth Schuppel, the Respondent has violated Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except to the extent heretofore found, the Respondent has not violated the Act in any other manner.[17]

Therefore, upon the foregoing findings of fact and conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[18]

The Respondent, La Guardia Hospital-H.I.P. Hospital, Inc., Forest Hills, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing or failing to bargain in good faith with the Union by refusing to furnish to the Union information relevant to the processing of grievances or the administration of the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act or in any like or related manner refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, forthwith furnish to the Union the personnel files of Elizabeth Schuppel, Leslie Stables, and Joanne Rosenberg.

(b) Upon request, forthwith furnish to the Union the progress notes portion of the patient charts which are relevant to the grievance of Elizabeth Schuppel and the emergency room sheets and operating room sheets relevant to the grievances of Parkash Kahara, and Linda Gabriel; provided however that upon receipt of such medical records the Union, its officers, agents, members, and attorneys shall not divulge such information to any other persons who are not involved in or necessary to the resolution of the grievances in question.

(c) Post at its place of business in Queens, New York, copies of the attached notice marked "Appendix."[19] Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's representative, shall be posted by it in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.[20]

[16] I will note here that it would be prudent, in the future, so as to avoid misunderstandings or confusion, that when the Union requests information contained in patient charts, it specify what documents it seeks and confirm such requests in writing. Although not strictly necessary, such a procedure would tend to avoid misunderstandings.

[17] This last conclusion, however, does not affect the settlement agreement executed by the parties as to the other allegations of the consolidated complaint which were not litigated in this proceeding. It is noted that the settlement agreement contains a nonadmissions clause.

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[20] In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 29, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not specifically found herein or remedied by the aforesaid settlement stipulation.